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WITTGENSTEIN TESTS MR. JUSTICE HOLMES: ON HOLMES'S PROPOSAL TO SEPARATE LEGAL CONCEPTS FROM MORAL CONCEPTS

THOMAS D. EISELE*

When Wittgenstein depicts himself being accused of “destroying everything of interest and importance,” he replies, in effect, that if what he has done is destructive, what is destroyed cannot have been of genuine interest—it was always a house of cards. Interest and importance in *Philosophical Investigations* are everywhere to be *tested* for their interest and importance—an ancient demand philosophy imposes upon itself, from Plato’s *Republic* to Thoreau’s *Walden*.

—Stanley Cavell¹

Do the comments of Mr. Justice Holmes on American law interest us today? Are Holmes’s remarks on what law is, or about legal education in America and how we might study and learn our legal system, important to today’s legal world? If Stanley Cavell is correct in thinking that philosophy—whether old or new—demands a say in testing anything that claims our interest, or that purports to have a place of importance in our lives, then these questions asked of Holmes’s writings are genuine philosophical queries.

Similar questions have been pursued Socratically, as is familiar from the *Apology*. In making his defense statement to his jurors, Socrates excuses the burden and the imposition that he thrusts upon his Athenian neighbors by claiming that both he and his neighbors need to examine their lives.² At his trial for impious behavior, Socrates implores his audience to expend the time and energy required to discover what interests them and what is truly

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¹ STANLEY CAVELL, *Philosophy the Day After Tomorrow*, in *PHILOSOPHY THE DAY AFTER TOMORROW* 111, 114 (Harvard Univ. Press 2005).

² PLATO, *Apology*, in *THE TRIAL AND DEATH OF SOCRATES* 31, 39 [28e-29a, 38a] (G.M.A. Grube trans., revised by John M. Cooper, 3d ed. Hackett Publ’g Co. 2000).

important to their community.³ From a more modern perspective, however, we can pursue these questions with a Wittgensteinian emphasis rather than a Socratic one; that is, we can ask whether Wittgenstein's later philosophy might afford us help in assessing the interest or the value of one of Holmes's signature remarks about the law and its study.

I. INITIAL BEARINGS

In the writings that constitute Wittgenstein's later work,⁴ we find the suggestion that much of what troubles us in the philosophical inspection of our lives can be traced to our misunderstanding how we have expressed ourselves in this world. It would not be correct to say that this problematic element is simply a matter of misunderstanding language. Rather, Wittgenstein implies that clarifying this problematic element may require us to investigate and to gain clarity on our relationship with our words, with what we say (or are inclined to say, or are tempted to say) in certain circumstances. So, for example, in his *Philosophical Investigations*, we find Wittgenstein saying, "Philosophy is a battle against the bewitchment of our intelligence by means of language."⁵

I am interested that in this remark, Wittgenstein does not say whether he finds language to be our bane or our salvation. If philosophy is a battle against the "bewitchment of our intelligence," Wittgenstein still does not make clear whether the phrase "by means of language" indicates the source of our bewitchment (i.e., what causes us to be bewitched), or whether it tells us how philosophy combats the bewitchment of our intelligence—namely, that we battle our own bewitchment by using the therapeutic means that our language makes available to us.

This is a useful equivocation and one perhaps intended by Wittgenstein. If I understand this aspect of his later philosophy, Wittgenstein is suggesting that language aids and abets us when we get in our own way, while simultaneously recognizing that language is also the means by which we untangle ourselves. Language is one cause of—and one route toward gaining some relief from—our ills. Human beings are the language-animal par

³ *Id.* at 32-33 [29d-30a, 30a-b].

⁴ These writings date from the 1930s and 1940s, and most were not made public until after Wittgenstein's death in 1951.

⁵ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 109 (G.E.M. Anscombe trans., 3d ed. Macmillan 1968) (1953).

excellence, and we live and form our lives largely within the medium of language. Its ills are our ills, its failings are our failings, and vice versa.

This observation marks a point of intimacy between Wittgenstein's understanding and Holmes's apparent vision of the law. Wittgenstein suggests that we find our way through the world with the help of language and that we also lose our way via these same means.⁶ Holmes, too, is sensitive to the role that language plays in orienting ourselves with respect to the world. For example, in *The Path of the Law*, Holmes says:

The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy.⁷

We could almost expect to find such a remark among the numbered sections of Wittgenstein's *Philosophical Investigations*. Here, Holmes is warning us that "the mere force of language continually invites us to pass from one domain," the law, "to the other," morality, "without perceiving it." We are not watching or noticing the semantic difference between legal terms and moral terms that share the same spelling, and so we "drop into fallacy." We become entangled in our words—despite the fact that these words are intended to be helpful—and thus we lose our way.

For Holmes, the danger in studying the law is that we take over words that are used in both the law and moral discourse and forget that the uses of these words may be quite different in each domain. We confuse or conflate them and fall into fallacy in our legal reasoning, treating as a legal attribute something that is actually a moral or ethical one.

Now, compare this Holmesian claim with a famous tag from *Philosophical Investigations* where Wittgenstein casts a thought

⁶ *Id.* and accompanying text.

⁷ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459-60 (1897).

very similar to Holmes's: "A *picture* held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably."⁸ For Wittgenstein, we are subject to a fixation, an unscrutinized way of taking our words—a way of hearing or understanding someone's expressions—and we fall into a state of captivity,⁹ a state of bewitchment.¹⁰ One reason we find it so difficult to avoid this captivation by our words—this bewitchment of our intelligence—is that the picture itself, the fixation or cliché, "lay in our language and language seemed to repeat it to us inexorably."¹¹ We cannot get outside our language, and so the only way through our problem is by means of the very same medium from which our problem stems.

Holmes asks us to imagine the "force of language continually invit[ing] us to pass from one domain to the other without perceiving it,"¹² while Wittgenstein proposes that we consider the thought that a "picture" or fixation "lay in our language and language seem[s] to repeat it to us inexorably."¹³ These twin portraits of our domination or entrancement by language are remarkably similar.

There is a further point of intimacy between the views of Wittgenstein and of Holmes. At an early juncture in his essay, Holmes says:

The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes arises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness.¹⁴

Holmes attributes our lack of understanding and our lack of care in observing the limit or boundary between law and morality to something we fail to realize. "[M]ore often," Holmes claims, "and indeed constantly," this confusion on our part about the boundary

⁸ WITTGENSTEIN, *supra* note 5, § 115 (emphasis in original).

⁹ *Id.*

¹⁰ *Id.* § 109.

¹¹ *Id.* § 115.

¹² Holmes, *supra* note 7, at 459. See also *infra* text accompanying note 39 (where Holmes speaks in terms of "the trap which legal language lays for us").

¹³ WITTGENSTEIN, *supra* note 5, § 115.

¹⁴ Holmes, *supra* note 7, at 459.

between law and morality, “is making trouble in detail without reaching the point of consciousness.”¹⁵ As I read Holmes, one of his central goals in writing his essay (or in delivering his lecture to the students at Boston University) was to make us conscious of this boundary and to emphasize our need to keep the boundary between domains clearly and distinctly before our minds whenever we are studying law or thinking about some point of legal right or legal duty.

Wittgenstein, too, wants to make us conscious of something—something we are apt to forget. In section 109 of the *Investigations*, just before the line about philosophy being a battle against our bewitchment, Wittgenstein says the following:

[P]hilosophical problems . . . are, of course, not empirical problems; they are solved, rather, by looking into the workings of our language, and that in such a way as to make us recognize those workings: *in despite of* an urge to misunderstand them. The problems are solved, not by giving new information, but by arranging what we have always known.¹⁶

And just sections before this point in the *Philosophical Investigations*, Wittgenstein sets the stage for this conception of philosophical problems and their solution:

Not, however, as if to this end we had to hunt out new facts; it is, rather, of the essence of our investigation that we do not seek to learn anything *new* by it. We want to *understand* something that is already in plain view. For *this* is what we seem in some sense not to understand.¹⁷

In these remarks, Wittgenstein describes his philosophical practice as an attempt to get us to realize or recognize something with which we are familiar but which we have a difficult time understanding or articulating. Holmes speaks in terms of drawing a distinction between law and morality—a distinction with which we are already familiar—but one we find difficult to remember or to keep present in our consciousness. Holmes says of the conflation

¹⁵ *Id.*

¹⁶ WITTGENSTEIN, *supra* note 5, § 109.

¹⁷ *Id.* § 89, ¶ b.

of this distinction that it “constantly is making trouble in detail without reaching the point of consciousness.”¹⁸ In a similar vein, Wittgenstein says:

The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something—because it is always before one’s eyes.) The real foundations of his enquiry do not strike a man at all. Unless *that* fact has at some time struck him.—And this means: we fail to be struck by what, once seen, is most striking and most powerful.¹⁹

Both men share the task of getting us to realize or to understand something about which we already are familiar, but which is hard for us to remember or to keep present and alive in our consciousness.

Where these two men diverge is in their diagnosis of what might make us aware of our dormant experience—our unconscious knowledge. For Holmes, reaching clarity as to the line or boundary between law and morality can be achieved by isolating and removing the offending verbiage. Once we enforce this boundary by means of excision—cutting, as it were, a clear path between the domain of law and the domain of morality—our confusion should subside.²⁰

For Wittgenstein, however, the solution is not so clear-cut. Human frailty and human language being what they are, the reduction of confusion is the work of a lifetime. Since we repetitively fall into these traps for the unwary, we must repetitively climb out of them.

We want to establish an order in our knowledge of the use of language: an order with a particular end in view; one out of many possible orders; not *the* order. To this end we shall constantly be giving prominence to distinctions which our ordinary forms of language easily make us overlook. This may make it look as if we saw it as our task to reform language.

. . . .

¹⁸ Holmes, *supra* note 7, at 459.

¹⁹ WITTGENSTEIN, *supra* note 5, § 129.

²⁰ See *infra* note 39 and accompanying text.

[But i]t is not our aim to refine or complete the system of rules for the use of our words in unheard-of ways.

....

... Instead, we now demonstrate a method, by examples; and the series of examples can be broken off.—Problems are solved (difficulties eliminated), not a *single* problem.²¹

Wittgenstein's sense of closure in dealing with our philosophical problems holds out no hope of a solution found and achieved once and for all, whereas Holmes seems not only to hope for one, but also to promise one. Holmes proposes a project of reclamation, reclaiming a clear line of demarcation between law and morality. For Wittgenstein, there is no such cure for being a fallible human who inherits a native language.

II. HOLMES'S TUTORIAL FOR LAW STUDENTS

The Path of the Law is an address originally delivered by Holmes to students at Boston University Law School; later, it was published in the *Harvard Law Review*. These events took place back in 1897. How is it possible that an address delivered (albeit by an esteemed jurist and student of the Anglo-American law) and published more than 110 years ago can still interest the American legal community in the twenty-first century?

That Holmes's writing does in fact still interest us is shown by some recent events. In 1997, for example, marking the centenary of Holmes's lecture, there were several symposia and law review issues (even books of commentary) devoted solely to our continued fascination with *The Path of the Law*.²² More recently, in a 2006 book called *The Canon of American Legal Thought*,²³ the editors (both of whom are Harvard law professors) gave pride of place in that volume as the lead essay (and the only essay drawn from the nineteenth century) to Holmes's foundational text. Empirically speaking, interest in Holmes's remarks on legal

²¹ WITTGENSTEIN, *supra* note 5, §§ 132-33.

²² See, e.g., Symposium, *The Path of the Law 100 Years Later: Holmes's Influence on Modern Jurisprudence*, 63 BROOK. L. REV. 1 (1997); see also *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* (Steven Burton ed., Cambridge Univ. Press 2000).

²³ DAVID KENNEDY & WILLIAM FISHER, *THE CANON OF AMERICAN LEGAL THOUGHT* (Princeton Univ. Press 2006).

education is still possible within the legal academy in today's twenty-first-century world. The question remains: Why?

Part of our continuing fascination with Holmes's essay may be that in this writing, unlike in his formal opinions, Holmes speaks not with the voice of a judge, but rather with the voice of a teacher. Presenting his thoughts from the perspective of a tutor or teacher may well make Holmes less forbidding and more amiable as an intellectual companion than when he speaks as an official oracle of the law. In this lecture-essay, Holmes offers to the students at Boston University his thoughts on how best to study and understand the Anglo-American common law system: "I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law"²⁴

Another possible factor to account for our continuing interest in this piece of nineteenth century writing is Holmes's penchant for pithy and memorable claims about the American common law. Consider the following aphorisms taken from Holmes's essay:

[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.²⁵

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.²⁶

The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.²⁷

No concrete proposition is self-evident, no matter how ready we may be to accept it²⁸

²⁴ Holmes, *supra* note 7, at 458.

²⁵ *Id.*

²⁶ *Id.* at 459.

²⁷ *Id.* at 461.

²⁸ *Id.* at 466.

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²⁹

We have too little theory in the law rather than too much³⁰

Holmes, in stating his views of the law, knew how to be provocative.

What provokes my interest in *The Path of the Law* is Holmes's claim that we continually court confusion when we conflate legal terms with moral terms, and his further claim that to avoid this conflation of the legal domain with the moral or ethical universe, we should keep these terms separate. Holmes begins his presentation of his position with the following remarks:

The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness.³¹

The confusion to which Holmes alludes is the conflation of words or concepts that are used both in the law and in ethical or moral contexts. The terms may look the same, but Holmes reminds us that legal terms can, in fact, have meanings different than similar-sounding (and similar-looking) moral or ethical terms. Given that Holmes wants to make us conscious of this source of confusion, what is its importance to us? Holmes believes that clarifying and maintaining this distinction has important practical and theoretical consequences.

The practical value of viewing the law in this Holmesian way is that such a view reveals the true basis or foundation of law and our legal system. Consider this fundamental question: Why does

²⁹ *Id.* at 469.

³⁰ *Id.* at 476.

³¹ *Id.* at 459.

any person obey the law? Because it is the right thing to do? Because we ought to obey it? These responses might be the way an ethicist or moral person would answer our fundamental question, but Holmes's answer is quite different. He claims a more self-interested reason for obedience of the law by citizens subject to its reach: good persons as well as bad persons obey the law out of fear. We fear the power of the state—we fear Leviathan—in that we seek to avoid the state-sanctioned punishment that normally attends any violation of the law. Holmes puts this point bluntly:

You can see very plainly that a bad man has as much reason [motivation] as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.³²

It is an article of faith for Holmes that we humans are motivated by a desire to avoid state sanctions. In this regard, every person (good man, bad man, rich woman, poor woman) is interested in avoiding the application of the state's monopoly on force or coercion.

It seems only practical, then, to view the law in this unpretentious (even cynical) way. And this way of viewing the law is exactly what Holmes advocates:

I have just shown the practical reason for saying so. If you want to know the law and nothing else, you must look at it as a bad man [i.e., a practical person], who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. The theoretical importance of the distinction is no less, if you would reason on your subject aright.³³

Before we turn to the theoretical importance of Holmes's argument, let us review for a moment his practical reason for

³² *Id.*

³³ *Id.*

observing this line between law and morality. If we consider all of the people within a legal system who are subject to its dictates, then some unknown percentage of those people will be “outlaws” or “outsiders”—exemplars of Holmes’s paradigmatic “bad man.” And, according to Holmes, these people care only about the material consequences of obeying or violating the law. Other people subject to the same legal system may, of course, have an “insider” and “internal” perspective on the law; they may obey the law because of the dictates of their conscience, or because they take law to have a normative hold. But it would seem that *all* of the people involved in a legal system—whether they view the law as outsiders or as insiders—will have, at a minimum, the object of avoiding the application of the state’s force to themselves. Holmes’s “bad man” standard for understanding legal behavior seems practical, then, in the sense that it measures the law in terms of the lowest common denominator concerning people’s motivation for following the law.

So far, we have considered what Holmes calls the practical value of maintaining this distinction between law and morality. Now what of the “theoretical importance of th[is] distinction,” which Holmes says is “no less [important], if you would reason on your subject” correctly? Holmes is not shy about his commitments or his priorities in this regard: “I do say that that distinction [between law and morals] is of the first importance for the object which we are here to consider, —a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines.”³⁴ How exactly does Holmes specify the theoretical importance of this distinction? He says:

The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy.³⁵

³⁴ *Id.*

³⁵ *Id.* at 459-60.

Holmes avows frequently enough that these common words or concepts—"rights," "duties," "malice," "intent," and "negligence"—have different meanings or significance, depending upon whether these terms are used in the legal world or in the world of morality and ethics. For example: "Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained."³⁶ Holmes's claim is that if we conflate law with morality, then certain legal concepts ("rights," "duties," etc.) become "invested with a mystic significance," out of all proportion to the actual legal sense or legal significance that "can be assigned" to these concepts. Holmes seeks to remove the mystification of these legal terms. How does he do so?

Holmes's effort to demystify begins early in his essay, although in subsequent pages his initial effort receives a number of elaborations:

The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. —One of the many evil effects of the confusion between legal and moral ideas, about which I shall have something to say in a moment, is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; —and so of a legal right.³⁷

For Holmes, what makes a duty a *legal* duty is the relative predictability that its breach or violation will have the material consequence of the application of a state-imposed sanction. And what makes a right a *legal* right, for Holmes, is the relative predictability that its assertion or enforcement will have the material consequence of the application of a state-imposed sanction against any person or entity infringing that right.

³⁶ *Id.* at 462.

³⁷ *Id.* at 458.

In *The Path of the Law*, Holmes eternally returns to this reductionist view of legal rights and legal duties. His view reduces such rights and duties to their external or material consequences in terms of the application or non-application of state-imposed sanctions. This element in Holmes's tutorial vision of the law evidences his faith in scientific progress, his sense that we need external and objective measures of the law. According to Holmes, we need to focus our attention on those aspects of phenomena that we can scientifically test, measure, and confirm (or disconfirm). Holmes adheres in this regard to the nineteenth century's faith in scientific progress and scientific understanding in all things human.

About the law in general, Holmes makes a similar (if more general) reductionist proposal:

The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts . . . , that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the . . . courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.³⁸

What, then, is Holmes's theoretical solution for this problem—this threatened confusion? How would Holmes bring clarity to this situation?

He continues to elaborate his modest proposal:

I hope that my illustrations have shown the danger, both to speculation [theory] and to practice, of confounding morality with law, and the trap which legal language lays for us on that side of our way. For my own part, I often doubt whether it would not

³⁸ *Id.* at 460-61.

be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.³⁹

It is hard to know just how serious Holmes's suggestion is, but let us consider its two parts literally. First, we are to rid ourselves of ("banish") what Holmes calls "every word of moral significance . . . from the law." Short of collective amnesia, it is difficult to conceive how this project might be accomplished. How exactly are we to eliminate these words from our legal textbooks and from the vocabulary of the law? Second, Holmes (perhaps more seriously) proposes that we "adopt" new words—new terms—which carry with them no moral or ethical connotations. This is a fairly common suggestion made in the abstract when we humans wish to clean up the seeming clutter of some area of our complicated lives and language. But how often do we truly invent new words, especially words without "extraneous" connotations (what Holmes calls "other words . . . uncolored by anything outside the law")? And even if we were to engage in such linguistic invention, once we were to begin to use these new words and concepts, it remains unclear how they should be able to withstand or avoid the natural tendency of words to collect associations within our language. These associations would inevitably include, I should think, ethical or moral connections insofar as our uses of these words refer to or connect with the ethical or moral elements in our lives.

Holmes seems oblivious to the difficulties inherent in the actual implementation of his proposal. Rather, he blithely recommends its beneficial consequences in terms of clarifying our minds and our view of the Anglo-American common law. How might we go about this process of "ridding ourselves of an unnecessary confusion" that would enable us to "gain very much in the clearness of our thought?"⁴⁰ Earlier in his address, Holmes says: "You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our

³⁹ *Id.* at 464.

⁴⁰ *Id.*

study, the operations of the law.”⁴¹ “But,” Holmes adds in a forlorn tone, “such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.”⁴²

As students of the law, we are advised by Holmes to avoid making a mystery of the law. When we study the law, Holmes says, we are apt to become confused if we fail to notice or mark “the confusion between legal and moral ideas.” This confusion in our legal terms or concepts will be dissipated to the extent that we are able to “assign” (or “explain”) a more precise “significance” to such terms or concepts. Holmes supposes that the precise legal meaning or significance of various terms and ideas in the law does not include any moral connotations or implications. Therefore, Holmes proposes we clarify the practice of law by ridding legal concepts of their moral counterparts—their moral “look-alikes”—and turning law into a strictly scientific study: “You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.”⁴³

I take it, then, that Mr. Justice Holmes wants to study law by isolating it as the object of our attention, thereby intentionally excluding all of the law’s relations from its others (other practices, other phenomena, other concepts). What might Wittgenstein say about this modest proposal by Holmes?

III. WITTGENSTEIN ON CRITERIA AND LANGUAGE-GAMES

The vision of language in Wittgenstein’s later philosophy conflicts with Holmes’s suggestion. Holmes wants us to draw or enforce his preferred distinction by keeping legal terms separate from moral terms. This enforced separation, from Wittgenstein’s perspective, would likely lead us to fail in reaching Holmes’s objective (i.e., clarification of meaning, reduction of confusion).

Put another way, from Wittgenstein’s perspective, Holmes’s proposal is self-defeating. We could not sustain the distinction that Holmes wishes us to draw if we were to follow his proposed advice to keep separate legal terms from moral terms. Why not? Because if—as Wittgenstein suggests—our words draw their

⁴¹ *Id.* at 461-62.

⁴² *Id.* at 462.

⁴³ *Id.* at 461-62.

meaning from the other words with which they are associated and are “at home,” and if our words receive their semantic identity from the contexts in which they are used (contexts and cases Wittgenstein calls our “language-games”), then to separate our words from one another will only produce semantic emptiness, not semantic clarity.

To separate terms in our language from their associated terms, or to attempt to substitute semantically neutral or “uncolored” terms for semantically-laden terms, would be to render those words not clear or unambiguous, but rather senseless. They would lack the very semantic connections or conceptual relations that give our words meaning. Therefore, if we were to follow Holmes’s advice, our actions would empty the words of the very content that Holmes imagines himself striving to retain and to keep distinct).

In Part I of this article, I adduced some of Wittgenstein’s thoughts about our getting in our own way by entangling ourselves and our minds in the workings of language, or by becoming bewitched by the intricacies of our words and concepts. Now I want to say something further about this aspect of Wittgenstein’s later philosophy.

In section 109 of *Philosophical Investigations*, Wittgenstein tells us that philosophy is a battle against the bewitchment of our intelligence, and then in section 115 he remarks that in the grip of philosophical puzzlement, we may be held captive by something he calls a “picture.” Here, Wittgenstein seems to be describing our situation or condition as one in which we are mesmerized by words—entranced by our own thoughts about matters. In such a fix, what does Wittgenstein recommend?

He immediately follows these remarks in the *Investigations* with very specific advice:

When philosophers use a word—“knowledge”, “being”, “object”, “I”, “proposition”, “name” —and try to grasp the *essence* of the thing, one must always ask oneself: is the word ever actually used in this way in the language-game which is its original home?—

What *we* do is to bring words back from their metaphysical to their everyday use.⁴⁴

⁴⁴ WITTGENSTEIN, *supra* note 5, § 116.

Wittgenstein recommends bringing our minds (and ourselves) back from the realm of metaphysics by bringing our words back from that same realm. We are counseled to ask ourselves whether the word that is giving us trouble is “ever actually used in this way in the language-game which is its original home?” This passage suggests that our minds run astray as and when our words go astray. And it implies that it is up to us to corral our words, or to shepherd them back into their ordinary contexts, their everyday modes of being and existence. We cannot understand ourselves or the world without understanding our language, and it is our language that is the home-ground of our understanding. We must bring our words back home—back home to us, where we live, back to ourselves in our ordinary lives. This, too, is where our words live and make sense.

In section 116 of the *Investigations*, Wittgenstein avers that words have “language-games” that are the original home for those word. What Wittgenstein means by “language-game” is contested in the critical literature, but at a minimum it seems to involve a conception of language that is in some sense holistic or contextual. To understand a word or term or concept, we must understand the cases or contexts in which it is used, and into which it can be projected. Such contexts include both other words and the events and actions surrounding our words and deeds.

At one point in his *Philosophical Investigations*, Wittgenstein lists some sample language-games. Among those he mentions are the following: “Giving orders, and obeying them— Describing the appearance of an object, or giving its measurements— Constructing an object from a description (a drawing)— Reporting an event— Speculating about an event— Forming and testing a hypothesis . . . Guessing riddles— Making a joke; telling it . . . Asking, thanking, cursing, greeting, praying.”⁴⁵ And in addition to these specific linguistic activities, we might even speak of the language-game of naming, or the language-game of pain, or the language-game of describing, or the language-game of love. In this regard, we would be referring to some collection of human activities, expressions, and phenomena that Wittgenstein calls “the whole, consisting of language and the actions into which it is woven.”⁴⁶ This particular aspect of Wittgenstein’s vision of language emphasizes that speaking and writing are as much matters of human action as they are matters of human expression. As Wittgenstein puts it, “Here the term ‘language-game’ is meant

⁴⁵ *Id.* § 23, ¶ c.

⁴⁶ *Id.* § 7, ¶ d.

to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.”⁴⁷ And, of course, Wittgenstein is known for having said: “For a *large* class of cases—though not for all—in which we employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in the language.”⁴⁸ In parsing this proposed definition or characterization of the meaning of a word, it seems important to recognize that Wittgenstein’s vision remains holistic or contextual. He is, after all, speaking about the meaning of a word as being a function of the word’s use in the language. Of what else does our language consist besides the associated terms, expressions, and actions that—taken together, holistically—we use in making ourselves heard, in expressing ourselves, and in communicating with others?

This brief commentary on language-games is cursory, I realize, but I must be equally abrupt in sketching Wittgenstein’s other signature concepts—“grammar” and “criteria”—as they relate to our project of trying to test Holmes’s remark about separating legal concepts from moral concepts. I am going to rely upon a single passage, one drawn from *The Blue Book*, which consists of a set of lecture notes that Wittgenstein prepared for his students at Cambridge University in the 1930s:

We said that it was a way of examining the grammar (the use) of the word “to know”, to ask ourselves what, in the particular case we are examining, we should call “getting to know”. There is a temptation to think that this question is only vaguely relevant, if relevant at all, to the question: “what is the meaning of the word ‘to know’?” We seem to be on a side-track when we ask the question “What is it like in this case ‘to get to know’?” But this question really is a question concerning the grammar of the word “to know”, and this becomes clearer if we put it in the form: “What do we *call* ‘getting to know’?” It is part of the grammar of the word “chair” that *this* is what we call “to sit on a chair”, and it is part of the grammar of the word “meaning” that *this* is what we call “explanation of a meaning”; in the same way to explain my criterion for another person’s having toothache is to give a

⁴⁷ *Id.* § 23, ¶ b.

⁴⁸ *Id.* § 43, ¶ a.

grammatical explanation about the word “toothache” and, in this sense, an explanation concerning the meaning of the word “toothache.”⁴⁹

In the second half of this quotation, Wittgenstein suggests that one aspect of the concept of a chair is that we can use such an object to sit on. Similarly, one aspect of the concept of “meaning” is that we can explain the meaning of a word or concept; we give and receive explanations of someone’s meaning (what he or she means by a particular word; what they meant by what they said; etc.). And, of course, sometimes, despite our best efforts, our attempted explanations of the meaning of a word fail. Wittgenstein goes on to say, “to explain my criterion for another person’s having toothache is to give a grammatical explanation about the word ‘toothache.’”⁵⁰

“Criteria,” in Wittgenstein’s sense—or, as Stanley Cavell calls them in *The Claim of Reason*: “Wittgensteinian” or “grammatical” criteria⁵¹—help us to understand the grammar of our words and concepts by characterizing those words and concepts and their uses. It is part of the concept of “chair” that we sit on a chair. Hence, in our grammar, the concept “chair” is tied to or associated with, and therefore characterized by, the concept “sit” (or “sit on”). This is why, in summing up one portion of his presentation on Wittgensteinian criteria, Cavell says that “‘Wittgensteinian criteria do not relate a name to an object, but various concepts to the concept of that object.’ I could also have said: They establish the position of the concept of an ‘object’ in our system of concepts.”⁵² How do Wittgensteinian criteria manage to do this?

Cavell indicates that Wittgensteinian criteria relate a series or number of words (concepts) to the concept of an object by forming a language-game. In this respect, Wittgensteinian or grammatical criteria afford us the terms by which we approach any given concept. “[C]riteria are the means by which we learn what our concepts are.”⁵³ These associated words are the linguistic means by which we come to know and use the concept in question—the

⁴⁹ LUDWIG WITTGENSTEIN, *THE BLUE AND BROWN BOOKS* 23-24 (Harper & Row 1958).

⁵⁰ *Id.*

⁵¹ STANLEY CAVELL, *THE CLAIM OF REASON* 72 (Oxford Univ. Press 1979) (“Wittgensteinian or (as I will now begin calling them) grammatical criteria are not marks or features which require special training or a specialized environment to have mastered, whereas Austinian (non-grammatical) criteria do”).

⁵² *Id.* at 76.

⁵³ *Id.* at 16.

concept sketched and staked out by the terms with which this concept is associated (and by which the concept is characterized). So, for example, Cavell notes: "Where 'call' comes in there, it introduces a phrase in which the word to be explained is used; i.e., it associates a concept with other concepts."⁵⁴ The grammatical criteria of a concept form its conditions of employment and its conditions of intelligibility in the sense that its aggregate conceptual associates are the means by which we learn (by which we come to know) this concept, and by which we come to use this concept within our lives and our language.

Cavell illustrates his reconstructive reading of Wittgenstein by way of an extended example concerning our concept of a chair:

"It is part of the grammar of the word 'chair' that *this* is what we call 'to sit on a chair'. . . ." That you use this object *that* way, sit on it *that* way, is our criterion for calling it a chair. You *can* sit on a cigarette, or on a thumb tack, or on a flag pole, but not in *that* way. Can you sit on a table or a tree stump in that (the "grammatical") way? Almost; especially if they are placed against a wall. That is, you can *use* a table or a stump *as* a chair (a place to sit; a seat) in a way you cannot use a tack as a chair. But so can you use a screw-driver as a dagger; that won't make a screw-driver a dagger. What can *serve as a chair* is not a chair, and nothing would (be said to) serve as a chair if there were no (were nothing we called) (orthodox) chairs. We could say: It is part of the grammar of the word "chair" that *this* is what we call "to serve as a chair."

The force of such remarks is something like this: If you don't know all this, and more, you don't know what a chair is; what "chair" "means"; what we call a chair; *what* it is you would be certain of (or almost certain of, or doubt very much) if you were certain (or almost certain, or doubt very much) that something is a chair.⁵⁵

⁵⁴ *Id.* at 70. Cavell's reference to the term "call" is his further specification of some of the implications in the quotation from THE BLUE BOOK, *supra* note 49.

⁵⁵ *Id.* at 71.

We come to learn what the word “chair” means in our language, as well as what a chair is in our world, by coming to know these little things—these seemingly insignificant (or barely significant) facts—about what we say about chairs and how we use chairs. And notice that in Cavell’s example, there are certain associated or cognate concepts repeatedly tied with our use of the word “chair”—concepts such as “serve,” “sit,” “place,” “seat,” and so on. These ordinary words or concepts are what we humans use in characterizing what we understand or take to be a chair in our world and our language.

Our words and concepts have their place or “home” among the myriad relations and connections that constitute our language. And so we find Wittgenstein saying: “When philosophers use a word—‘knowledge’, ‘being’, ‘object’, ‘I’, ‘proposition’, ‘name’—and try to grasp the *essence* of the thing, one must always ask oneself: is the word ever actually used in this way in the language-game which is its original home?”⁵⁶ When we allow ourselves to speak (or when we find ourselves driven or forced to speak) outside of our normal, natural language-games, then we are apt to allow ourselves to say something that we do not (and cannot) mean there and then. On such occasions, although we have the illusion of making sense, we are speaking emptily or, as Wittgenstein puts it early on in the *Investigations*, we are speaking “*outside* of a particular language-game.”⁵⁷ This domestic imagery suggests that our words are tethered to the world by means of the criteria we have for their use and invocation. So, too, we tether ourselves (our minds and our bodies) to the world through our use and invocation of our words. This is how we humans fashion a haven in this world.

IV. TESTING HOLMES’S MODEST PROPOSAL

I mentioned earlier that Holmes states in *The Path of the Law* that legal terms have different meanings than similar-looking moral terms. How does Holmes know this? In other words, what linguistic or grammatical knowledge does Holmes have in this regard, and where did he come into its possession? Or put another way, consider this: When the word “duty” (or the word “right”) appears in a sentence in English, how does Holmes know—and how do we know—whether that word is being used in its legal sense or in its moral sense? If you ask yourself these questions, I

⁵⁶ WITTGENSTEIN, *supra* note 5, § 116, ¶ a.

⁵⁷ *Id.* § 47, ¶ d.

think you'll respond by saying that his knowledge (and our knowledge) of such matters is based upon the other words associated with the key word, as well as the context in which these words are used or into which these words are being projected. In Wittgenstein's lingo, these two factors are roughly what he means by his critical vocabulary, "criteria" and "language-games."

I realize that eventually Holmes wishes to translate or reduce the meaning of legal terms to their external signs or material consequences.⁵⁸ Yet initially, in grouping or categorizing the similar-looking terms into different classes of legal uses and moral or ethical uses, Holmes does not—and we do not—use any such material bases for distinguishing or classifying these terms. Instead, he uses—and we use—the ordinary linguistic criteria and our intuitive sense of contextual propriety that we inherit and develop when we become initiates of a natural language as one of its native speakers.

To test my contention, I would like to consider at slightly greater length a few argumentative points that Holmes makes in favor of his preferred way of understanding the Anglo-American common law system. Remember the remark from Holmes that

[t]he law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth⁵⁹

This list of five terms roughly parallels the series of examples and cases that Holmes invokes later in his essay as a way of instructing us about the need to draw the distinction between law and morality. Here, rather than considering all five instances, let us limit ourselves to two of Holmes's most elaborate examples offered in support of his argument.

First, consider what Holmes says about rights, both moral and legal:

For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of

⁵⁸ Holmes, *supra* note 7, at 460-61; see also *supra* text accompanying notes 37-38.

⁵⁹ Holmes, *supra* note 7, at 459-60.

interference with individual freedom which we think are prescribed by conscience, or our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.⁶⁰

In speaking about “the rights of man in a moral sense,” Holmes uses, in this context at least, the following several associated words or cognate phrases: he says that moral rights deal with “limits of interference” as to “individual freedom” which we think are “prescribed” by “conscience,” or our “ideal.” Holmes uses these specific terms to characterize the notion of human rights in its moral or ethical dimension. Holmes’s invocation of these terms confirms Wittgenstein’s claim that we rely on our criteriological cognate concepts, along with the contexts (“language-games”) in which we use them (or refuse to use them), as the means by which we make meaning through the medium of our language.

It appears to me that—in practice—Holmes uses the grammatical tools that Wittgenstein would suggest we all have and use in coming to a fuller consciousness of the resources and riches of our inherited language (including our inherited language of the Anglo-American common law). I am suggesting that these five aspects of human rights, taken cumulatively, help us to identify one notion of human rights as having a place or a function within a moral or ethical ambit. I should note, however, that I am not saying that any one of these five associated concepts or phrases is solely moral in its semantic influence or effect. It remains true (and is equally important to note) that some or all of these same five concepts may also have a place or function in a legal universe as well. That is, these same words or concepts can do work in the law as they do in morality. Indeed, the similarity of use (or of operation or function) is what makes it possible to conflate these words in the first place.

At this stage in our understanding of these words, no one thing that Holmes has shown us has been decisive with regard to our

⁶⁰ *Id.* at 460.

ability to draw a line between a moral orbit and a legal orbit for the concept of “the rights of man.”⁶¹ All I wish to claim here is that it is through the use or invocation of these five key words or phrases that Holmes is able to so much as draw his distinction and make his point vis-à-vis moral rights being distinct from legal rights (on at least some occasions, in at least some contexts). The words or concepts that Holmes invokes—not the material consequences or any other “external” indicia—allow him to propound his plausible claim that the “same” words or concepts have different meanings in moral contexts than they have in legal contexts.

Similarly, consider how Holmes speaks about the concept of malice (again, with regard to both its moral and its legal dimensions):

I mentioned, as other examples of the use by the law of words drawn from morals, malice, intent, and negligence. It is enough to take malice as it is used in the law of civil liability for wrongs, —what we lawyers call the law of torts, —to show you that it means something different in law from what it means in morals, and also to show how the difference has been obscured by giving to principles which have little or nothing to do with each other the same name. . . . [I]n my opinion at least, the word [“malice” as used in the law of torts] means nothing about motives, or even about the defendant’s attitude toward the future, but only signifies that the tendency of his conduct under the known circumstances was very plainly to cause the plaintiff temporal harm.⁶²

As to this apparent distinction between malice in a moral sense and malice in a legal sense, Holmes once again relies implicitly upon an appeal to certain associated concepts. Moments later in his essay, for example, Holmes states: “Morals deal with the actual internal state of the individual’s mind, what he actually intends.”⁶³ In connecting this remark with Holmes’s preceding attempt to distinguish between a moral and a legal connotation of the word “malice,” we can see that in Holmes’s formulation set forth in the text accompanying footnote 62, he explicitly dissociates the

⁶¹ *Id.* at 460 and accompanying text.

⁶² *Id.* at 463.

⁶³ *Id.*

concepts of motivation and mental attitude from *legal* malice. Negating these conceptual cognates of moral malice makes plausible Holmes's assertion concerning the difference between the moral signification and the legal signification of the word "malice."

In fact, I believe that these associated concepts are what help us to conjure up either the moral or the legal world into which the word "malice" might be intelligibly projected (when, that is, we are invoking the concept of malice in terms of considering or judging a person's actions to be either malicious or not). Again, these Wittgensteinian conceptual criteria (to which Holmes refers as he attempts to draw his distinction) seem to be the actual socio-linguistic bases on which Holmes unwittingly relies in order to make his point.

V. DRAWING A MORAL

Holmes could not do what he claims to want to do—draw a clear distinction between legal terms and moral terms—without invoking the grammatical, criteriological means that ordinary language makes available to us. Holmes also says that he wants to expel such material from our language, as though that would clarify things, but ridding ourselves of such socio-linguistic material would only blind us. It would remove the bases we have for drawing the distinction in the first place. This distinction is not merely theoretical; it exists in our lives and in our actual language. Perhaps it makes sense, then, that we should avail ourselves of the living conceptual material by which the distinction maintains its thriving existence.

To the extent that Holmes advises us, or his student audience, to ignore the conceptual associations that the concept of law has (associations, for example, that it may have with the concept of morality or other concepts in ethics), Holmes is telling us to ignore the actual conceptual relations and connections—the grammatical criteria—that can inform us about the nature of the concept of law:

When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that [reason] that I ask you for

the moment to imagine yourselves indifferent to other and greater things.⁶⁴

Holmes's plea for a studied "indifference" misconceives how we might ever achieve a more clear understanding of the concept of law (or its associated conceptual cognates). In effect, Holmes asks us to shun exactly the kind of grammatical knowledge to which I referred earlier in my discussion of Wittgenstein's later work. Holmes wants us to rid ourselves of these criteria, because they complicate (he says "confuse") our understanding. But do they? Or are they, instead, the only means available for clarifying our minds and dissipating our confusion? The latter response is, I think, what Wittgenstein would care to maintain.

Holmes's modest proposal that "every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law"⁶⁵ expresses a tempting fantasy—one that promises clarity. This is an attractive, even seductive offer. If we were to follow Holmes's advice, however, we would thereby lose the conceptual relations and connections that keep our concept of law in balance and in play. From Holmes's perspective, such a loss seems small indeed: "We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought."⁶⁶ Would that it were true. The "fossil records," the "ethical associations," the "unnecessary" complexity or confusion of terms are all another way of describing the grammatical criteria that we have for guiding ourselves and our concepts through this complicated life and world of ours.

Stanley Cavell describes the alternative vision of language that we find in Wittgenstein's later philosophy:

Wittgenstein's idea of a criterion [is used by Wittgenstein] . . . in connection with his idea of grammar, to describe, in a sense to explain, how language relates (to) things, how things fall under our concepts, how we individuate things and name, settle on nameables, why we call things as we do—questions of how we determine what *counts* as

⁶⁴ *Id.* at 459.

⁶⁵ *Id.* at 464.

⁶⁶ *Id.*

instances of our concepts, this thing as a table, that
as a chair, this other as a human, that other as a god.
To speak is to say what counts.⁶⁷

Wittgenstein would, as I understand him, reject Holmes's counsel to shun our criteria for the employment of our legal and moral concepts. To tell these concepts apart, or to draw the very distinctions that Holmes wishes us to draw, we must consult the specific indicia—the conceptual associations, the fossil records of our language (as memorialized and catalogued, for example, in the *Oxford English Dictionary*), and the linguistic connections—that Holmes wishes us to rid ourselves of.

Wittgenstein's counter-counsel is daunting. It reminds us that there is no easy means of clarifying our thought—no short-cut to achieving clarity. Instead, by reminding ourselves of what we say in various circumstances, we once again must try to “bring words back from their metaphysical to their everyday use,” and thereby re-locate the concepts that puzzle us by re-situating those concepts within the “original language-games” that form their home.⁶⁸ In Wittgenstein's later philosophy, the repetitive work of clarification is interminable, at least in the sense in which (as Cavell puts it) “nothing short of the powers of each word in the language is sufficient to understand the powers of language.”⁶⁹

Taking Holmes's advice would remove from the scene and our language the very means by which we daily continue to draw the line between law and morality (a line which Holmes wishes us to maintain). From Wittgenstein's perspective, as I read him, to do without these means would be to do without our ordinary lives and our ordinary world, including the world of Anglo-American common law.

⁶⁷ STANLEY CAVELL, *IN QUEST OF THE ORDINARY: LINES OF SKEPTICISM AND ROMANTICISM* 86 (Univ. of Chi. Press 1988).

⁶⁸ See *supra* note 44 and accompanying text.

⁶⁹ Stanley Cavell, *Foreword* to NORTHROP FRYE, *A NATURAL PERSPECTIVE* ix, xiv (Columbia Univ. Press 1995) (1965).